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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Mono)

STATE FARM GENERAL INSURANCE COMPANY, Plaintiff and Respondent, v. WATTS REGULATOR COMPANY, Defendant and Appellant.	C082125 (Super. Ct. No. CV150009)

Arbitration Forums, Inc. provides arbitration services to insurance carriers and self-insured companies. State Farm General Insurance Company (State Farm) and Watts Regulator Company (Watts) are members of Arbitration Forums, and signatories to a "Property Subrogation Arbitration Agreement" (Arbitration Agreement), which requires arbitration of subrogation claims.

In November 2014, Arbitration Forums posted a notice on its website, advising members that the Arbitration Agreement would be amended to exclude product liability claims from the compulsory arbitration provision. The notice stated that the Arbitration

Agreement, as amended (the Amended Agreement), would become effective on January 1, 2015.

On January 20, 2015, State Farm filed a subrogation complaint against Watts asserting a single cause of action for product liability. The complaint sought to recover payments made to State Farm's insured, Michael McGuire, for water damage caused by the failure of a valve manufactured by Watts. The events causing damage to McGuire are alleged to have occurred in September 2012.

Watts filed a motion to compel arbitration, arguing the agreement in effect at the time of the loss (the Arbitration Agreement) applies, and requires arbitration of the subrogated product liability claim. State Farm opposed the motion, arguing the agreement in effect at the time of the filing of the claim (the Amended Agreement) applies, and does not require arbitration of the claim. The trial court agreed with State Farm and denied the motion to compel arbitration. We affirm.

I. BACKGROUND

McGuire's property sustained water damage in September 2012. At the time, State Farm and Watts were signatories to the Arbitration Agreement, each having signed the agreement independent of the other, some time before.

A. The Arbitration Agreement

At the time of McGuire's loss, the relevant provisions of the Arbitration Agreement were as follows:

Article First (entitled "Compulsory Provisions") stated: "Signatory companies must forego litigation and submit any personal, commercial, or self-insured property subrogation claims to Arbitration Forums."

Article Second (entitled "Exclusions") contained eight exclusions from the compulsory arbitration requirement, none of which applies to the McGuire claim.

Article Fifth (entitled "[Arbitration Forums'] Function and Authority") stated, in pertinent part that: "[Arbitration Forums], representing the signatory companies, is

authorized to: [¶] (a) make appropriate Rules and Regulations for the presentation and determination of controversies under this Agreement[.]" The Arbitration Forums, Inc. Rules (Rules) place jurisdictional, geographic, and monetary limits on what will constitute a qualifying "claim." By way of example, the Rules specify that the requirement of compulsory arbitration only applies to claims under $100,000.

Article Sixth (entitled "Withdrawals") stated: "Any signatory company may withdraw from this Agreement by notice in writing to [Arbitration Forums]. Such withdrawal will become effective sixty (60) days after receipt of such notice except as to cases then pending before arbitration panels. The effective date of withdrawal as to such pending cases shall be upon final compliance with the finding of the arbitration panel on those cases."

B. The Amended Agreement

In November 2014, Arbitration Forums posted a notice on its website, advising members of a new rule. The notice described the new rule as follows: " 'No company shall be required, without its written consent, to arbitrate any claim or suit if (I) it is a product liability claim arising from an alleged defective product. . . .' " The notice advised that the new rule would become effective on January 1, 2015. The notice further advised that: "While the use of the Property Program to resolve disputes involving product liability claims from an alleged defective product will no longer be compulsory as of January 1, 2015, Cases filed prior to January 1, 2015, will remain in arbitration's jurisdiction and will be processed to hearing."[1]

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[1] We have not been provided with a copy of the notice, or any other information defining the "Property Program." However, we gather from the parties' briefs that the term "Property Program" refers to Arbitration Forums' arbitration program for property subrogation claims.

Neither State Farm nor Watts appears to have exercised the right to withdraw from the Arbitration Agreement upon receiving notice of the changes that would ultimately result in the Amended Agreement.[2]

C. Trial Court Proceedings

On January 20, 2015, State Farm filed a subrogation complaint seeking reimbursement for payments in the amount of $81,091.54 made to McGuire. The complaint asserts a single cause of action for products liability.

On January 14, 2016, Watts filed a motion to compel arbitration, arguing the claim was subject to compulsory arbitration under the Arbitration Agreement. State Farm opposed the motion, arguing the claim was excluded from compulsory arbitration under the Amended Agreement. The trial court denied the motion. Watts filed a timely notice of appeal.

II. DISCUSSION

A. Applicable Legal Principles and Standard of Review

Both the California Arbitration Act (Code of Civ. Proc., § 1280 et seq.) and the Federal Arbitration Act (9 U.S.C. § 1 et seq.) recognize that arbitration is a " ' "speedy and relatively inexpensive means of dispute resolution," ' " that is intended " ' "to encourage persons who wish to avoid delays incident to a civil action to obtain an adjustment of their differences by a tribunal of their own choosing." ' "[3] (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1204; see *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 339.) "The fundamental policy

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[2] We have not been provided with a copy of the Amended Agreement. However, the parties agree that the Amended Agreement supersedes the Arbitration Agreement, and became effective January 1, 2015. The parties also agree that the McGuire claim would not be subject to compulsory arbitration under the Amended Agreement.

[3] Undesignated statutory references are to the Code of Civil Procedure.

underlying both acts 'is to ensure that arbitration agreements will be enforced *in accordance with their terms.*' [Citations.]" (*Avery v. Integrated Healthcare Holdings, Inc.* (2013) 218 Cal.App.4th 50, 59 (*Avery*).) "Arbitration is therefore a matter of contract." (*Ibid.*)

The " ' " ' " 'policy favoring arbitration cannot displace the necessity for a voluntary *agreement* to arbitrate.' " [Citation.] "Although '[t]he law favors contracts for arbitration of disputes between parties' [citation], ' "there is no policy compelling persons to accept arbitration of controversies which they have not agreed to arbitrate . . . ." ' [Citations.]" ' [Citation.] 'Absent a clear agreement to submit disputes to arbitration, courts will not infer that the right to a jury trial has been waived.' " ' " (*Avery, supra,* 218 Cal.App.4th at p. 59.)

Ordinary contract principles apply in interpreting arbitration agreements, including the principle that " '[t]he basic goal of contract interpretation is to give effect to the parties' mutual intent at the time of contracting." (*Avery, supra,* 218 Cal.App.4th at p. 60; see also Civ. Code, § 1636; *Jones v. Jacobson* (2011) 195 Cal.App4.th 1, 17.) Absent some special or technical use, the clear and explicit meaning of contractual provisions (interpreted in light of their ordinary and popular sense) controls judicial interpretation. (Civ. Code, § 1644; *TRB Investments, Inc. v. Fireman's Fund Ins. Co.* (2006) 40 Cal.4th 19, 27; *Victoria v. Superior Court* (1985) 40 Cal.3d 734, 744.)

Section 1281.2 requires a trial court to grant a petition to compel arbitration "if [the court] determines that an agreement to arbitrate the controversy exists." (§ 1281.2.) Accordingly, "when presented with a petition to compel arbitration, the trial court's first task is to determine whether the parties have in fact agreed to arbitrate the dispute." (*Gorlach v. Sports Club Co.* (2012) 209 Cal.App.4th 1497, 1505.)

" 'There is no uniform standard of review for evaluating an order denying a motion to compel arbitration. [Citation.] If the court's order is based on a decision of fact, then we adopt a substantial evidence standard. [Citations.] Alternatively, if the

court's denial rests solely on a decision of law, then a de novo standard of review is employed. [Citations.]' " (*Avery, supra*, 218 Cal.App.4th at p. 60.) Because the material facts are undisputed, we review the meaning and interpretation of the parties' agreements de novo, applying ordinary rules of contract interpretation.

B. Interpreting the Arbitration Agreement

At the outset, we observe that the present case appears to be a skirmish in an ongoing war between the parties. We take judicial notice of the fact that the same parties appear to have litigated the same issues, involving the same or substantially the same agreements, in multiple cases around the country.[4] We take particular notice of *State Farm General Ins. Co. v. Watts Regulator Co.* (2017) 17 Cal.App.5th 1093 (*State Farm*), an opinion issued after the close of briefing in this case. As we shall discuss, the *State Farm* court considered and rejected the same arguments raised by Watts herein, for reasons that apply equally here.

At the time of McGuire's loss, State Farm and Watts were signatories to the Arbitration Agreement, which required them to "forego litigation and submit any personal, commercial, or self-insured property subrogation claims to" Arbitration Forums. Watts argues that the McGuire claim was subject to compulsory arbitration under the Arbitration Agreement because the events giving rise to the loss occurred prior to January 1, 2015, the effective date of the Amended Agreement. Watts' argument proceeds from the premise that the relevant date for determining whether a claim is subject to compulsory arbitration is the date of the loss (i.e., the date of accrual), rather than the date on which the claim was submitted to Arbitration Forums (i.e., the date of filing). We reject this premise.

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[4] Watts' and State Farm's requests for judicial notice are granted.

Nothing in the Arbitration Agreement or Rules suggests that the date of accrual has any relevance in determining whether a claim is subject to compulsory arbitration. (See *State Farm, supra*, 17 Cal.App.5th at p. 1100.) Neither the Arbitration Agreement nor the Rules say anything about the accrual of claims. By contrast, the Arbitration Agreement and Rules repeatedly refer to the filing or submission of claims, indicating that the filing of a claim has some significance in the operation of the parties' agreement, while the accrual of a claim does not. Of greatest significance, Article Sixth, which establishes the manner in which signatory companies may withdraw from the Arbitration Agreement, logically supports the view that the date of filing is determinative.

As noted, Article Sixth provides that "any signatory company" may withdraw from the Arbitration Agreement by giving notice in writing to Arbitration Forums, effective 60 days from receipt. The Arbitration Agreement provides for only one exception to the 60-day withdrawal rule, for "cases then pending before arbitration panels." The Arbitration Agreement expressly provides that such pending cases must remain subject to arbitration until final compliance with the finding of the arbitration panel. Thus, signatory companies that no longer agree to submit claims to arbitration are contractually prohibited from removing *pending* cases from arbitration and litigating them instead. By necessary implication, signatory companies are permitted to remove claims that are *not* pending, even though such claims, to be cognizable as "claims," must have accrued. It follows that Article First does not require the parties to arbitrate claims that have accrued, but not been filed. Reading the Arbitration Agreement as a whole, and giving effect to all its provisions, we conclude that the relevant date for determining whether a property subrogation claim is subject to compulsory arbitration is the date of filing, and not the date of accrual. (See *State Farm, supra,* 17 Cal.App.5th at pp. 1099-1100.)

Watts resists this conclusion, arguing "the parties are bound by the Arbitration Agreement to which they were signatories, not by the terms of the [Amended] Agreement

which were unilaterally changed by [Arbitration Forums] after Mr. McGuire's claim accrued." The *State Farm* court rejected the same argument. (*State Farm, supra,* 17 Cal.App.5th at p. 1098.) Key to the court's analysis was the observation, equally pertinent to the instant discussion, that "this is not an ordinary arbitration agreement, where one party has contracted with another party to resolve disputes arising under their agreement in an arbitral forum rather than in court." (*Id.* at p. 1099.) Rather, the court explained, the arbitration agreement was one in which both parties, "acting independently and along with many other insurers and self-insured companies, have signed an agreement prepared and promoted by the organization providing the arbitration services that are described in the agreement." (*Ibid.*) So too here.

The *State Farm* court went on to note that the arbitration agreement authorizes Arbitration Forums to make rules, some of which "clearly operate to limit the scope of a signatory's agreement in Article First to submit 'any' property subrogation claims to [Arbitration Forums]." (*State Farm, supra,* 17 Cal.App.5th at p. 1099.) Reading the arbitration agreement and rules together, the *State Farm* court concluded that "neither of the parties had any power to determine the terms of the [Arbitration Forums] arbitration agreement; they could only decide, as they did, whether to assent to terms set by [Arbitration Forums], and if they did not, they were free to withdraw." (*Ibid.*) The court continued: "Nothing in the [Arbitration Forums] arbitration agreement or [Arbitration Forums] rules suggested that [Arbitration Forums] could not change those terms. And nothing in the [Arbitration Forums] arbitration agreement or [Arbitration Forums] rules suggested that [Arbitration Forums] could not specify the date on which and circumstances under which changes to the [Arbitration Forums] arbitration agreement would become effective." (*Ibid.*) We agree with the *State Farm* court's reasoning and adopt its analysis as our own. Having done so, we can quickly dispatch Watts' remaining arguments.

Relying on *Avery* Watts argues the date of accrual is "the critical point in time," adding that the implied covenant of good faith and fair dealing prevents Arbitration Forums from "unilaterally" amending the terms of the Arbitration Agreement to "retroactively" exclude product liability claims. (See *Avery, supra*, 218 Cal.App.4th at p. 62 [the "critical point in time" in determining whether an employer's modifications to an arbitration agreement apply to an employee's claims "is when the claims accrued, not when the employee filed his or her judicial complaint"].) The *State Farm* court considered and rejected the same argument, distinguishing *Avery* on the facts, and explaining: "This is not a case where one party unilaterally changed its agreement with another party. It is a case where a third party, [Arbitration Forums], set the terms of the agreement, and made a 'unilateral' change, effective on a future date and with advance notice to the parties, both of whom were free to withdraw from the agreement yet neither of whom withdrew. The implied covenant of good faith and fair dealing is not implicated in this case. Defendant's repeated assertion of a 'vested right' to arbitration of product liability claims that accrued before January 1, 2015, fails for the same reasons." (*State Farm, supra,* 17 Cal.App.5th at pp. 1100-1101.)

Relying on *Nolde Bros., Inc. v. Local No. 358, Bakery & Confection Workers Union, AFL-CIO* (1977) 430 U.S. 243 and *John Wiley & Sons, Inc. v. Livingston* (1964) 376 U.S. 543, Watts additionally argues that, "[a]t most, [Arbitration Forums'] decision not to offer compulsory arbitration of products liability claims after January 1, 2015, meant that the original Arbitration Agreement would expire or be terminated as of that date." The *State Farm* court considered the same argument, based on the same authorities, which address the survival of arbitration provisions in collective bargaining agreements that have either expired (see *Nolde Bros. Inc., supra,* at p. 255) or been terminated (see *John Wiley & Sons, Inc., supra,* at p. 555.) The *State Farm* court found these authorities to be "utterly inapt, factually and legally." (*State Farm, supra,* 17 Cal.App.5th at p. 1101.) The court explained: "This case does not have its source in a

contract between the parties. It does not involve a collective bargaining agreement, or any other kind of agreement that has been negotiated between the parties to it and that provides for arbitration of disputes over obligations created by the expired contract. This is a subrogation claim arising from a loss suffered by plaintiff's insured—not a dispute arising out of a contractual relationship between plaintiff and defendant. At the risk of repetition, the [Arbitration Forums] arbitration agreement is an industry program offered by a third party that has determined the terms under which it will provide arbitration services to companies who agree to bind themselves to the terms set by the third party. There is no legal basis for applying rules governing retroactivity, vested rights, or accrual of claims under these circumstances." (*Ibid.*) We agree.

Relying on an order compelling arbitration in another case between the parties, Watts next argues that State Farm is or should be "judicially estopped" from taking the position that the Amended Agreement governs this case. Watts fails to show that the order implies anything about State Farm's position in the present case, or suggests a basis for applying the equitable doctrine of judicial estoppel. (See *State Farm, supra,* 17 Cal.App.5th at p. 1102 [rejecting identical argument where, as here, Watts relied on a one-page order compelling arbitration—apparently by stipulation—of a claim that State Farm had filed with Arbitration Forums prior to January 1, 2015, and then withdrawn].)

Finally, Watts argues that our interpretation renders the Arbitration Agreement illusory because, "Watts, a manufacturer, cannot 'submit' any property subrogation claim for arbitration—it has no property subrogation claims to prosecute." By contrast, Watts argues, "[o]nly an insurance company, like State Farm, has the ability to submit insurance subrogation claims for arbitration." We reject this contention, relying, again, on *State Farm*, in which the court explained: "Defendant's argument again presupposes there is merit to its repeated assertion that the accrual date of a claim is pertinent, an assertion we have rejected. Moreover, neither party has withdrawn from the [Arbitration Forums] arbitration agreement as amended. There was, and still is, until either party withdraws,

an obligation to arbitrate property subrogation claims not involving products liability, in accordance with the rules and other exclusions set by [Arbitration Forums]. The fact that product liability claims are no longer subject to compulsory arbitration does not make the agreement illusory. And perhaps even more to the point, '[a] contract is unenforceable as illusory *when one of the parties* has the unfettered or arbitrary right to modify or terminate the agreement or assumes no obligations thereunder.' [Citation.] This is not such a case." (*State Farm, supra,* 17 Cal.App.5th at p. 1103.) This is not such a case either. Accordingly, we reject the contention that our construction of the Arbitration Agreement renders it illusory.

III. DISPOSITION

The order denying Watts' motion to compel arbitration is affirmed. State Farm shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

/S/

RENNER, J.

We concur:

/S/

RAYE, P. J.

/S/

DUARTE, J.